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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 757

ETHEL MEYER, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

ETHEL MEYER, individually, and as Executrix of the Estate of PETER MEYER, deceased, Defendant-Appellant.

STATEMENT UNDER RULE 15(b)

This is an appeal from summary judgment for the plaintiff in an action against the defendant* by the United States to recover income taxes assessed against her deceased husband.

The complaint in this action was filed on September 23, 1958, and a summons was thereupon issued. The summons and complaint were served on defendant on September 30, 1958. The answer was served and filed on November 18, 1958.

On October 26, 1961, plaintiff served and filed a motion for summary judgment against the defendant returnable [fol. 2] November 14, 1961, which was adjourned to December 12, 1961. The defendant served and filed an affidavit in opposition on December 6, 1961. After argument before Judge Palmieri and reserving of decision, the Court, on

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* Although the defendant was sued individually and as Executrix of her husband's estate, judgment was rendered against her only individually, apparently for the reason that the tax assessments were binding and enforceable against the estate of the deceased, without judgment.

January 12, 1962, rendered an opinion granting summary judgment in favor of plaintiff.

Judgment was signed by the Court on March 1, 1962, and was entered on March 2, 1962, in favor of plaintiff and against the defendant for the sum of $6,159.09 together with interest thereon amounting to $5,712.40, and $40.20 costs and disbursements, amounting in all to the sum of $11,911.69. A notice of appeal by defendant to this Court, from said judgment, was filed on March 14, 1962.

[fol. 3]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action File Number 138-73

SUMMONS—September 23, 1958

To the Above-Named Defendant:

You are hereby summoned and required to serve upon Arthur H. Christy, United States Attorney for the Southern District of New York, plaintiff's attorney, whose address is United States Court House, Foley Square, New York 7, New York, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Herbert A. Charlson, Clerk of Court, Eugene Liehr, Deputy Clerk.

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure)

[fol. 4]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 138-73

COMPLAINT—Filed September 23, 1958

Comes now the plaintiff, the United States of America, by its attorney, Arthur H. Christy, United States Attorney in and for the Southern District of New York, and for claim against the defendant, Ethel Meyer, individually and as executrix of the estate of Peter Meyer, deceased, complains and alleges as follows:

I

This action is authorized and requested by the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury, and is brought under the direction of the Attorney General of the United States.

II

Jurisdiction is conferred upon this Court by Sections 1340 and 1345 of Title 28, United States Code, for the reason that this is a civil action arising under the Internal Revenue Laws of the United States and is brought by the United States as a party plaintiff.

[fol. 5]

III

The defendant, Ethel Meyer, resides at 277 West End Avenue, New York, New York, within the jurisdiction of this Court.

IV

On May 22, 1946, the then Commissioner of Internal Revenue made an assessment of taxes upon the income of one Peter Meyer, the now deceased husband of the defendant, Ethel Meyer, for the calendar year 1945 in the amount of $5,633.25, of which $1,408.18 was paid on

April 1, 1946, and $1,408.08 was paid on August 1, 1946. Said Commissioner certified a list of said assessment to the then Collector of Internal Revenue for the Collection District of New York by whom it was received on May 27, 1946 and by whom notice of the assessment was given to and demand for payment of the amount thereof was made on June 6, 1946, upon Peter Meyer. Peter Meyer failed and neglected to pay in full the amount assessed, whereupon the said Collector on July 11, 1955, filed a notice with the Register's Office, Hall of Records, New York County, New York, wherein a lien is claimed on behalf of the plaintiff upon all property and rights to property, real and personal, of Peter Meyer in the amount of $2,816.99 plus interest that may accrue in addition to the tax assessed. The facts alleged in this and paragraphs V, VI, and VII, are set forth in abbreviated form in "Exhibit A" which is attached hereto and expressly made a part hereof.

V

On June 17, 1947, the then Commissioner of Internal Revenue made an assessment of taxes upon the income [fol. 6] of one Peter Meyer, the now deceased husband of the defendant, Ethel Meyer, for the calendar year 1946 in the amount of $3,342.10. Said Commissioner certified a list of said assessment to the then Collector of Internal Revenue for the Collection District of New York by whom it was received on June 18, 1947, and by whom notice thereof was given to and demand for payment of the amount thereof was made on June 18, 1947, upon Peter Meyer. Peter Meyer failed and neglected to pay any part of the amount assessed, whereupon the said Collector on July 11, 1955, filed a notice with the Register's Office, Hall of Records, New York County, New York, wherein a lien is claimed on behalf of the plaintiff upon all property and rights to property, real and personal, of Peter Meyer in the amount of $3,342.10 plus interest that may accrue in addition to the tax assessed.

VI

On May 10, 1951, Peter Meyer executed Tax Collection Waivers (Form 900) extending the time for the collection of his income tax, assessed as aforesaid, for the calendar year 1945 by distraint or by a proceeding in court to December 31, 1956, and extending the time for the collection of his income tax, assessed as aforesaid, for the calendar year 1946 by distraint or by a proceeding in court to December 31, 1957.

VII

On August 3, 1955, Peter Meyer submitted an Offer in Compromise (Form 656-C) with reference to the hereinbefore mentioned assessments of income taxes for the calendar years 1945 and 1946, which Offer in Compromise [fol. 7] was rejected on May 28, 1956, thus extending the period for collection of the 1945 taxes to September 25, 1958, and to September 25, 1959, for the 1946 taxes.

VIII

The outstanding balance of the aforementioned assessments in the total sum of $6,159.09 plus interest that may accrue in addition thereto is now outstanding, unpaid, due, and owing.

IX

Plaintiff alleges upon information and belief that Peter Meyer, a resident of New York, died on December 28, 1955, and that the defendant, Ethel Meyer, his widow, was appointed executrix of his estate and is still acting as such.

X

During his lifetime, Peter Meyer was insured under several life insurance policies issued to him by the Equitable Life Assurance Society of the United States and the New York Life Insurance Company, which policies are set out as follows:

	Policy Number	Amount of Policy	Cash Value*
Equitable Life Assurance Society of the United States 393 Seventh Avenue New York, New York	7,857,676	$20,000.00	$10,455.87
New York Life Insurance Company 51 Madison Avenue New York, New York	8,804,034	15,000.00	8,415.00
	8,804,035	10,000.00	5,610.00
	8,804,036	5,000.00	2,805.00

* The cash value is the cash surrender value at the date of the decedent's death.

[fol. 8]

XI

With respect to each of the policies set forth in paragraph X above, Peter Meyer retained the right to change the beneficiary and the incidents of ownership thereof and possessed the right to demand the cash surrender value from the insurer.

XII

The defendant, Ethel Meyer, was on the date of Peter Meyer's death the beneficiary under each of the policies of life insurance set forth in paragraph X above.

XIII

Upon the death of Peter Meyer, the hereinabove named insurance companies paid out $50,664.27 as the value as of the date of payment of the hereinbefore mentioned policies of life insurance issued by them.

XIV

On the date payment was made by the hereinabove named insurance companies, and prior to the death of Peter Meyer, there was a Notice of Federal Tax Lien on file with the Register, City of New York, Hall of Records, New York, New York, upon all property and rights to property belonging to the taxpayer, Peter Meyer, now deceased.

XV

Of the total amount paid out as aforesaid by the hereinabove named insurance companies, the defendant, Ethel Meyer, received $23,674.27.

[fol. 9]

XVI

The $23,674.27 received as aforesaid by the defendant, Ethel Meyer, represents a portion of the total cash surrender value of the hereinabove mentioned policies of life insurance and is an amount in excess of the hereinbefore mentioned tax obligations of Peter Meyer, deceased.

Wherefore, plaintiff prays:

1. That the Court adjudge and decree that Peter Meyer was, and the estate of Peter Meyer is, indebted to the plaintiff in the amount of $6,159.09 plus interest until paid as provided by law.

2. That the Court adjudge and decree that the defendant, Ethel Meyer, received, as the cash surrender value of policies of insurance on the life of Peter Meyer, deceased, property in the amount of $26,674.27, an amount in excess of the herein involved tax obligations of Peter Meyer, deceased.

3. That the Court adjudge and decree that plaintiff has a valid and existing lien on the property received by the defendant, Ethel Meyer, as the cash surrender value of the policies of insurance on the life of Peter Meyer, deceased, to the extent of the herein involved tax liabilities of the said Peter Meyer, deceased.,

4. That the Court adjudge and decree that the lien of the plaintiff be foreclosed against the property received by the defendant, Ethel Meyer, as the cash surrender value of policies of life insurance upon the life of Peter Meyer, deceased, and that a sufficient amount thereof be [fol. 10] applied to make payment in full of the sum of $6,159.09 plus interest until paid as provided by law and, if the defendant, Ethel Meyer, no longer retains such cash surrender value, that the plaintiff have and recover judg-

ment against the defendant, Ethel Meyer, in the amount of $6,159.09 plus interest until paid as provided by law, which judgment and interest shall in no event exceed the amount of the cash surrender value received by the defendant, Ethel Meyer.

5. That the plaintiff have such other and further relief as the Court may deem proper in the premises.

Dated: New York, N. Y., September 22, 1958.

Arthur H. Christy, United States Attorney, By: James McK. Rose, Jr., Assistant United States Attorney, Office and Post Office Address: United States Court House, Foley Square, New York 7, N. Y.

[fol. 11]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EXHIBIT A TO COMPLAINT

	Calendar Year 1945	*Calendar Year 1946*
Type of Tax	Income	Income
Date of Assessment	5-22-46	6-17-47
Amount Assessed	$5,633.25—tax	$3,342.00–tax
Payments and Date Payments Made	$1,408.18—4-1-46 $1,408.08—8-1-46	——
Balance	$2,816.99	$3,342.10
Assessment List Received by Collector	5-27-46	6-18-47
Date of Notice and Demand	6- 6-46	6-26-47
Date Notice of Lien Filed	7-11-55	7-11-55
Tax Collection Waiver Executed	5-10-51	5-10-51
Date Waiver Expires	12-31-56	12-31-57
Offer In Compromise Submitted	8- 3-55	8- 3-55
Offer in Compromise Rejected	5-28-56	5-28-56

[fol. 12]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 138-73

ANSWER—Filed November 18, 1958

Defendant, Ethel Meyer, individually and as executrix of the Estate of Peter Meyer, Deceased, answering the complaint by Gettinger & Gettinger, her attorneys:

1. Denies any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraphs of the complaint numbered "I", "V", "VI", "VII", "VIII", and "XIV".

2. Denies any knowledge or information thereof sufficient to form a belief as to each and every allegation contained in paragraph of the complaint numbered "IV" except, upon information and belief, that payments were made by the deceased, as alleged.

3. Denies each and every allegation contained in paragraph of the complaint numbered "XVI" except that from the said sum of $23,674.27 received by defendant, Ethel Meyer; she received the sum of only $441.21 of the cash surrender value, viz: that the total cash surrender value of the aforementioned policies set forth in the complaint amounted to the sum of $27,285.87 and that the bank loans on the said policies at the time of the death of the deceased totalled $26,844.66 which, when subtracted from the aforementioned sum of $27,285.87, left the balance of the cash surrender value of $441.21 received by defendant, Ethel Meyer, which said sum of $441.21 the said defendant hereby offers to pay to the plaintiff in full satisfaction [fol. 13] of any and all obligations insofar as the said defendant is individually concerned.

For a First Separate Distinct and Affirmative Defense

4. That at all the times herein stated, defendant, Ethel Meyer, was the wife of Peter Meyer, the deceased.

5. That during his lifetime the said Peter Meyer was insured under several life insurance policies issued to him by the Equitable Life Assurance Society of the United States and the New York Life Insurance Company, which policies totalled the sum of $50,000., under which policies the said insured designated his wife, the defendant, Ethel Meyer, as the sole beneficiary therein.

6. That during his lifetime said Peter Meyer borrowed sums of money from a bank and, as security for the repayment thereof, assigned all of the said policies as collateral security to the bank and pledged same to the bank for the repayment of the said loans, which loans were outstanding and unpaid at the time of his death and amounted to the sum of $26,844.66.

7. That the cash surrender value of the said policies at the time of the death of the said Peter Meyer amounted to the sum of $27,285.87.

8. That the amount of the outstanding loans due to the bank under the said policies of the deceased at the time of his death amounted to the sum of $26,844.66 which was $441.21 less than the cash surrender value under said policies.

9. That the lien for taxes, if any, of the plaintiff could only attach to the cash surrender value of the said policies [fol. 14] assuming there were no outstanding loans and there were no assignments made or pledges made under the loans herein, and that the said liens, if any, asserted herein could not and cannot affect the proceeds under the said policies over and above the cash surrender value, to which the defendant, Ethel Meyer, as beneficiary, became entitled to receive and did receive upon the death of her husband, Peter Meyer.

10. That the net proceeds that the defendant, Ethel Meyer, individually received under the said policies wherein she was named as beneficiary (with the exception of the sum of $441.21) were property rights in the said policies which belonged solely to the plaintiff, individually, as beneficiary named under said policies and had no prior existence

and only arose by reason of the death of the insured, Peter Meyer, and became her property solely by reason of and at the time of the death of said insured, and that, therefore, the lien, if any, of the plaintiff did not arise and could not attach to the said proceeds so received by the defendant, Ethel Meyer, with the exception of the said sum of $441.21, aforesaid, which said sum of $441.21 defendant, Ethel Meyer, offers to pay to the plaintiff in full satisfaction of the claim against her, individually, herein.

Wherefore, defendant, Ethel Meyer, individually, and as executrix of the Estate of Peter Meyer, deceased, demands judgment dismissing the complaint with costs.

Gettinger & Gettinger, By Martin A. Gettinger, Member of Firm.

[fol. 15]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 138-73

NOTICE OF MOTION FOR SUMMARY JUDGMENT—
Filed October 26, 1961

Sir:

Please take notice, that upon the pleadings herein and upon annexed affidavit of Eugene R. Anderson, sworn to the 25th day of October 1961, the undersigned will move this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, at a motion part thereof, in Room 506, United States Courthouse, Foley Square, New York 7, New York, on the 14th day of November 1961, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order granting summary judgment and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York, October 25, 1961.

Yours, etc.,

Robert M. Morgenthau, United States Attorney for the Southern District of New York, Attorney for Plaintiff, United States of America, Office and Post Office Address: United States Court House, Foley Square, New York 7, New York.

To: R. Gettinger and M. Gettinger, Esqs., Attorneys for Defendant, 1407 Broadway, New York, New York.

[fol. 16]

Civ. No. 138-73

AFFIDAVIT OF EUGENE R. ANDERSON, READ IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of New York
County of New York
Southern District of New York—ss.:

Eugene R. Anderson, being duly sworn, deposes and says:

1. He is an Assistant United States Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and as such is in charge of and familiar with the above-captioned action.

2. This affidavit is made in support of plaintiff's motion for summary judgment.

3. The facts stated in the annexed "Statement of Material Facts as to Which the Plaintiff Contends There is no Genuine Issue to be Tried" appear from the pleadings herein and from the files of the plaintiff and, upon information and belief, are true.

4. There is no genuine issue as to any material fact.

Wherefore, it is respectfully requested that plaintiff's motion for summary judgment be granted.

Eugene R. Anderson, Assistant United States Attorney.

(Sworn to by Eugene R. Anderson, October 25, 1961.)

[fol. 17]

Civ. No. 138-73

STATEMENT OF MATERIAL FACTS AS TO WHICH THE PLAINTIFF CONTENDS THERE IS NO GENUINE ISSUE TO BE TRIED

1. This action is authorized and requested by the Commissioner of Internal Revenue, a delegate of the Secretary of the Treasury, and is brought under the direction of the Attorney General of the United States.

2. Jurisdiction is conferred upon this Court by Sections 1340 and 1345 of Title 28, United States Code, for the reason that this is an action arising under the Internal Revenue Laws of the United States and is brought by the United States as a party plaintiff.

3. This action was commenced by the filing of the complaint on September 23, 1958.

4. Defendant, Ethel Meyer, resides at 277 West End Avenue, New York, New York, within the jurisdiction of this Court.

5. Defendant, Ethel Meyer, was personally served with the summons and complaint in this action on September 30, 1958.

6. Defendant, Ethel Meyer, appeared by her attorneys, Gettinger & Gettinger, Esqs., and filed an answer on November 18, 1958.

[fol. 18] 7. On May 22, 1946, the Commissioner of Internal Revenue made an assessment upon the income of one Peter Meyer, the now deceased husband of the defendant, Ethel Meyer, for the calendar year 1945, in the amount of $5633.25, of which $1408.18 was paid on April 1, 1946 and $1408.08 was paid on August 1, 1946; that no other payments were received with respect to the aforesaid as-

sessment; that the balance of $2816.99, plus interest, is still due and owing to the United States of America and remains unpaid.

8. Notice of the aforesaid assessment was given to and demand for payment of the amount thereof was made on June 6, 1946, upon said Peter Meyer.

9. On June 17, 1947, the Commissioner of Internal Revenue made an assessment of taxes upon the income of the said Peter Meyer, for the calendar year 1946, in the amount of $3342.10.

10. Notice of this assessment was given to and demand for payment of the amount thereof was made on June 18, 1947, upon the said Peter Meyer. No part of this assessment was paid and there still remains due and owing to the United States of America the amount of $3342.10 plus interest.

11. As a result of the foregoing assessments, there still remains due and owing to the United States of America, the total sum of $6159.09, plus interest, until paid, as provided by law.

12. On July 11, 1955 the District Director of Internal Revenue filed a notice with the Register's Office, Hall of Records, New York County, New York, New York, wherein a lien is claimed on behalf of the plaintiff upon all property and rights to property, real and personal, of the said [fol. 19] Peter Meyer, in the total amount of $6159.09, plus interest, according to law.

13. The taxpayer, Peter Meyer, a resident of New York, died on December 28, 1955 and defendant, Ethel Meyer, is the executrix of his estate.

14. During his lifetime, Peter Meyer was insured under several life insurance policies issued to him by the Equitable Life Assurance Society of the United States and the New York Life Insurance Company, which policies are set out as follows:

	Policy Number	*Amount of Policy*	*Cash Value**
Equitable Life Assurance Society of the United States 293 Seventh Avenue New York, New York	7,857,676	$20,000.00	$10,455.87
New York Life Insurance Company 51 Madison Avenue New York, New York	8,804,034	15,000.00	8,415.00
	8,804,035	10,000.00	5,610.00
	8,804,036	5,000.00	2,805.00
Total		$50,000.00	$27,285.87

* The cash value is the cash surrender value at the date of the decedent's death.

15. With respect to each of the policies set forth above, Peter Meyer retained the right to change the beneficiary and the incidents of ownership thereof and possessed the right to demand the cash surrender value from the insurer.

16. The defendant, Ethel Meyer, widow of Peter Meyer, was on the date of Peter Meyer's death, the beneficiary under each of the policies of life insurance set forth above.

[fol. 20] 17. Upon the death of Peter Meyer, the above named insurance companies paid $50,664.27 to the defendant, Ethel Meyer, as the proceeds of the above mentioned policies of life insurance issued by them.

18. During his lifetime, the said Peter Meyer borrowed sums of money from the Huntington National Bank of Columbus, Ohio, and on June 29, 1943 assigned and pledged all of the said policies as collateral security to the bank for the repayment of the loans, which loans were outstanding and unpaid at the time of his death in the amount of $26,844.66.

19. Under the terms of the assignment or pledge the bank was given the right to satisfy its claim out of the "net proceeds of the policy when it becomes a claim by death".

20. Upon the death of Peter Meyer the defendant, Ethel Meyer, paid the amount due to the bank to discharge the pledges.

21. In summary:

Amount of Policies	$50,000.00
Amount of Proceeds paid to defendant	50,664.27
Cash Surrender Value on date of death	27,285.87
Amount paid by defendant to discharge pledges	26,844.66
Unpaid Income taxes due from decedent, Peter Meyer	6,159.09*

* Plus interest.

[fol. 21]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 138-73

AFFIDAVIT OF MARTIN A. GETTINGER, READ IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—Filed December 6, 1961

State of New York
County of New York
Southern District of New York—ss.:

Martin A. Gettinger, being duly sworn, deposes and says:

1. That I am a member of the law firm of R. Gettinger & M. Gettinger, attorneys for the defendant herein and am fully familiar with all the facts and proceedings heretofore had herein.

2. This affidavit is made in opposition to plaintiff's motion for summary judgment.

3. The defendant's statement of facts, which controverts plaintiff's statement of facts, is annexed to the within affidavit. Defendant admits the facts annexed to plaintiff's affidavit, except as controverted by the annexed statement of facts.

[fol. 22] 4. The plaintiff's moving affidavit stated nothing concerning any question of law which is involved in this case. However, there are important questions of law, as well as questions of fact, in this case which warrant the denial of plaintiff's motion for summary judgment.

5. One of the questions of law herein is as follows: Is the plaintiff entitled to judgment against the insured's widow, the defendant herein, and who is the beneficiary of the policies of the deceased? That question is resolved by whether the defendant received the cash surrender value of the policies herein. Defendant concedes that, insofar as the cash surrender value of the policies herein, she received only the sum of $441.21 with respect thereto, which sum the defendant has, at all times, tendered to plaintiff and has been ready to pay and now, again, offers to pay. Insofar as the sum actually received* by the life insurance companies to the Huntington National Bank of Columbus, Ohio, defendant did not receive any part of the cash surrender value of the policies, except for the said sum of $441.21. It is also important in this case to note the fact that, with respect to said cash surrender value, the insured made an assignment and pledge of all the policies herein on June 29, 1943 to the Huntington National Bank of Columbus, Ohio, which date preceded the dates that the plaintiff obtained the liens herein by the making of assessments on May 22, 1946 and on June 17, 1947. The cash surrender value of the policies (except for the said sum of $441.21), having been assigned and pledged by the insured prior to the obtaining of the liens by the plaintiff, the plaintiff as a matter of law, is not entitled to collect [fol. 23] any sum over and above said cash surrender value, except the sum of $441.21, from the defendant by reason of the fact that any sum received by her is exempt under Section 166 of The Insurance Law of the State of New York and does not constitute "property and rights to property" under Section 6321 of Title 26 of the Internal Revenue Code. It is respectfully submitted that the foregoing is the law applicable to this case, respecting which an opposing memorandum of law is submitted.

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* "received" should be "paid".

Wherefore, deponent respectfully requests that the plaintiff's motion for summary judgment be denied.

Martin A. Gettinger

(Sworn to by Martin A. Gettinger, December 4, 1961.)

[fol. 24]

Civ. No. 138-73

DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH IT IS CONTENDED THAT THERE EXISTS GENUINE ISSUES TO BE TRIED

1. That from on and after June 29, 1943, Peter Meyer, the insured (deceased) retained the right to change the beneficiary of the policies, subject to the assignment made on the aforementioned date, to the Huntington National Bank of Columbus, Ohio; that said Peter Meyer did not retain, by reason of the said assignment made on June 29, 1943 of the policies herein, the incidence of ownership thereof nor did he possess the right to demand the cash surrender from the insurers. (This statement controverts paragraph 15 of the plaintiff's statement of facts.)

2. Upon the death of Peter Meyer, the insurance companies paid the sum of $50,664.27 as follows:

The sum of $26,844.66 was paid to the Huntington National Bank of Columbus, Ohio, and the difference between the said sum of $50,664.27 and the said sum of $26,844.66 (paid to Huntington National Bank) was paid or received by Ethel Meyer, the beneficiary herein. The cash surrender [fol. 25] value of all the policies (less the sum of $441.21) was received by the Huntington National Bank of Columbus, Ohio, to whom all the said policies were assigned and pledged as security for the loan of June 29, 1943. (This statement controverts paragraph 17 of the plaintiff's statement of facts.)

3. With respect to paragraphs 20 and 21 of plaintiff's statement of facts, the same is correct except as denied by paragraph numbered 2 supra and except that the defendant denies that she paid the amount due to the Bank to discharge the pledges and alleges that the amount paid

to the Huntington National Bank of Columbus, Ohio, to discharge the assignments and pledges of the life insurance policies was paid by the life insurance companies.

[fol. 26]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

OPINION—January 12, 1962

The United States has moved for summary judgment in an action by it against Ethel Meyer, individually and as executrix of her husband's estate, for $6,159.09, plus interest. This amount is due on taxes assessed against Peter Meyer for the years 1945 and 1946. Notice of the tax assessments was given and demand made in 1946 and 1947 respectively, thereby giving rise to a "lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to" the decedent. 26 U. S. C. §6321.

The Government seeks to recover the money owed it out of insurance proceeds received by Ethel Meyer as the beneficiary of several policies on the life of Peter Meyer. The policies had a face value of $50,000 and a cash surrender value of $27,285.87. The policies permitted decedent to change the beneficiary and to demand the cash surrender value. In 1943, prior to the tax assessments, the insured had pledged and assigned the policies to the Huntington National Bank of Columbus, Ohio, as security for a loan of $26,844.66. Under the terms of the assignment, the bank was given the right to satisfy its claim out of the net proceeds of the policy when it became a claim by death. Upon the death of Peter Meyer the bank was paid $26,844.66 and the remainder of the proceeds were paid to Ethel Meyer.

In *United States* v. *Bess*, 357 U. S. 51 (1958), the Supreme Court held that if the cash surrender value of a life insurance policy is property under the applicable state law it is property under 26 U. S. C. §6321, and a federal tax lien attaches to it and continues to exist after the tax-
[fol. 27] payer's death. The defendant does not contest her deceased husband's tax liability nor does she dispute

that a federal tax lien may attach to the cash surrender value of life insurance policies. She contends, however, that the debt to the bank was paid out of the cash surrender value, leaving the difference between the cash surrender value of the policy and the amount paid to the bank, $441.21, for enforcement of the Government's lien. This contention is directly contrary to this Circuit's holding in *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956).

The defendant in *Behrens* was the beneficiary of a number of insurance policies on the life of her husband which had a cash surrender value of $22,000 and a face value of $59,000. The policies had been pledged to a bank for a loan of $17,000 which defendant was obliged to pay. Judge Learned Hand denied her contention that she was entitled to deduct this amount from the cash surrender value and permitted plaintiff to enforce its tax lien against the full amount of the cash surrender value, saying:

> "The tax lien • • • did not indeed have priority over the pledge; but the 'proceeds' were large enough to pay both claims, and it is well settled law that, when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only" (p. 507).

[fol. 28] Applying this rule to the instant case, it follows that the Government is entitled to enforce its tax lien against the full amount of the cash surrender value notwithstanding payment to the bank of the loan for which the policies were assigned and pledged.

Plaintiff's motion for summary judgment is granted. Submit order on notice.

Dated: New York, N. Y., January 12, 1962.

Edmund L. Palmieri, U. S. D. J.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 138-73

JUDGMENT—Entered March 2, 1962

Plaintiff, United States of America, having moved for summary judgment and the cause having been duly heard, and this Court by the Honorable Edmund L. Palmieri having rendered its memorandum opinion on January 12, 1962, it is

Ordered that the plaintiff's motion for summary judgment be and the same hereby is granted and it is further

Ordered and adjudged, that the plaintiff, United States of America, have judgment against the defendant, Ethel Meyer, for the sum of $6,159.09, together with interest thereon amounting to $5,712.40, and together with costs and disbursements in the sum of $40.20, amounting in all to the sum of $11,911.69 and that the plaintiff have execution therefor.

Dated: New York, New York, March 1, 1962.

Edmund Palmieri, U. S. D. J.

[fol. 30]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil No. 138-73

NOTICE OF APPEAL—Filed March 14, 1962

Sir:

Please take notice that Ethel Meyer, the defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment dated March 1, 1962, made by Hon. Edmund L. Palmieri, United States District Judge, granting judgment to the plaintiff, United States of America, against the defendant, Ethel Meyer, for the sum of $6,159.09, together with interest of $5,712.40 and with costs and disbursements of $40.20, amounting in all to the sum of $11,911.69, which judgment was entered on March 2, 1962, and that the defendant appeals from each and every part of said judgment, as well as from the whole thereof.

Dated: New York, New York, March 14, 1962.

Yours, etc.

R. Gettinger & M. Gettinger, Attorneys for Defendant, By Martin A. Gettinger, Member of Firm, Office & P. O. Address, 1407 Broadway, New York 18, New York.

[fol. 31] To:

Robert M. Morgenthau, Esq., United States Attorney, Attorney for Plaintiff, United States Courthouse, Foley Square, New York 7, New York.

Clerk, United States District Court, Southern District of New York.

[fol. 32] [File endorsement omitted]

Appendix to Brief for the United States of America —Filed September 11, 1962

[fol. 33]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 138-73

UNITED STATES OF AMERICA, Plaintiff,

—v.—

ETHEL MEYER, individually and as Executrix of the Estate of PETER MEYER, deceased, Defendant.

AMENDED JUDGMENT—Entered June 5, 1962

A judgment, No. 65,186, having been entered in the above matter on March 2, 1962 against the defendant individually but not as executrix of the estate of Peter Meyer, deceased, and defendant having appealed from said judgment to the United States Court of Appeals for the Second Circuit and the plaintiff having moved before the said Court of Appeals for an order remanding the action to this Court for the purpose of moving before this Court to amend the judgment and said motion having been granted by the said Court of Appeals and a motion having been made by the plaintiff before this Court pursuant to the mandate of said Court of Appeals to amend the judgment and no one having appeared in opposition thereto, now therefore, it is

[fol. 34] Ordered and adjudged that judgment 65,186 heretofore entered on March 2, 1962 is amended *nunc pro tunc* to read as follows:

Plaintiff, United States of America, having moved for summary judgment and the cause having been duly

heard, and this Court by the Honorable Edmund L. Palmieri having rendered its memorandum opinion on January 12, 1962, it is

Ordered that the plaintiff's motion for summary judgment be and the same hereby is granted and it is further

Ordered and adjudged, that the plaintiff, United States of America, have judgment against the defendant, Ethel Meyer, individually and as Executrix of the Estate of Peter Meyer, deceased, for the sum of $6,159.09, together with interest thereon amounting to $5,712.40, and together with costs and disbursements in the sum of $40.20, amounting in all to the sum of $11,911.69 and that the plaintiff have execution therefor.

Dated: New York, New York, June 4, 1962.

Edmund L. Palmieri, U.S.D.J.

Recd. in Clerk's Office 6/5/62

[File endorsement omitted]

[fol. 35]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 19—October Term, 1962

Argued October 15, 1962

Docket No. 27477

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ETHEL MEYER, individually, and as Executrix of the Estate of Peter Meyer, Deceased, Defendant-Appellant.

OPINION—October 24, 1962

Before:

Waterman, Hays and Marshall, Circuit Judges.

Appeal from a summary judgment of the District Court for the Southern District of New York, Edmund Palmieri, Judge, in favor of the Government in an action to recover income taxes assessed against defendant's deceased husband under 26 U. S. C. §§6321, 6322.

Affirmed.

Eugene R. Anderson, Assistant United States Attorney, New York City (Vincent L. Broderick, United States Attorney for the Southern District of New York, Robert Arum, Assistant United States Attorney, New York City, on the brief), for plaintiff-appellee.

[fol. 36] Samuel W. Sherman of R. Gettinger & M. Gettinger, New York City, for defendant-appellant.

PER CURIAM:

The decedent pledged life insurance policies to a bank as collateral security for a loan. Thereafter he was assessed certain deficiencies in payment of income tax. At the time of his death both the loan and the assessments remained unpaid. Payment of the loan exhausted the cash surrender value of the policies except for an amount too small to pay the deficiency assessments. The Government seeks to recover the tax liabilities from the proceeds of the insurance policies.

As the District Court held, 202 F. Supp. 606, this case is controlled by *United States* v. *Behrens*, 230 F. 2d 504 (2d Cir. 1956), *cert. denied*, 351 U. S. 919, which held that

> "when one creditor has a claim against two funds as security and another creditor has a claim against only one of them, the loan of the first will be marshalled against that fund which is security for his loan only." (p. 507).

Appellant attempts to distinguish the *Behrens* case on the ground that in that case the government's assessment was made prior to the taxpayer's pledge of the policies, whereas here the pledge preceded the assessment. Appellant argues that the lien could attach only to the excess of the surrender value over the amount of the loan. But in *Behrens*, the "tax lien, not having been filed, did not indeed have priority over the pledge" (p. 507). In the present case by reason of the prior pledge of the policies to the bank the government's tax lien was secondary, but it was not nugatory, and the proceeds passed to appellant subject [fol. 37] to both claims at the taxpayer's death. Whatever the value of the tax lien during the taxpayer's lifetime, it could be fully satisfied out of that portion of the proceeds representing the former cash surrender value by marshalling the bank's prior claim against the balance of the proceeds at his death.

Judgment affirmed.

[fol. 38]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. Sterry R. Waterman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ETHEL MEYER, individually and as Executrix of the Estate of Peter Meyer, deceased, Defendant-Appellant.

JUDGMENT—October 24, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 39] [File endorsement omitted]

[fol. 40] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 41]

SUPREME COURT OF THE UNITED STATES

No. 757, October Term, 1962

ETHEL MEYER, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 4, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.